Supreme Court, U.S.
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No. 99-198

In the

Supreme Court of the United States

KATHLEEN EVANS, as Conservator of JESSICA EVANS, a protected person,

Petitioner,

v.

LEDERLE LABORATORIES, LINK CLINIC and O. SHARMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Lederle Laboratories, now known as Lederle Pharmaceuticals, is a Division of American Cyanamid Company. The parent company of American Cyanamid Company is American Home Products Corporation.

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National Childhood Vaccine Injury Act ("the Vaccine Act"), 42 U.S.C. § 300aa-1, *et seq.* 1, 2, 3, 10, 11

COUNTERSTATEMENT OF THE CASE

This case presents the question of whether the National Childhood Vaccine Injury Act ("the Vaccine Act"), 42 U.S.C. § 300aa-1, *et seq.*, preempts the one-refiling rule contained in the Illinois statutes of limitation. 735 ILCS 5/13-217. Because of certain omissions in the Statement of the Case of Petitioner, Kathleen Evans, as Conservator of Jessica Evans, the respondent, Lederle Laboratories, submits this Counterstatement of the Case so that this Court will have before it all facts pertinent to the disposition of this petition.

A. The National Childhood Vaccine Injury Act

The Vaccine Act was enacted by Congress in 1986. One of its principal purposes is to "free manufacturers from the specter of large, uncertain liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994). As the Court of Appeals noted in the decision below, the Vaccine Act was designed to provide "a no-fault compensation system for individuals harmed by childhood vaccines." *Evans v. Lederle Laboratories*, 167 F.3d 1106, 1108 (7th Cir. 1999); App. 3a. Under that compensation system, individuals who believed that they suffered a vaccine-related injury could seek a no-fault compensation award by filing a petition in the United States Court of Federal Claims, which names the Secretary of Health and Human Services as respondent. 42 U.S.C. § 300aa-11 *et seq.* Awards under the Vaccine Act are administered from a fund whose source of revenue is vaccine taxes. 42 U.S.C. § 300aa-11 *et seq.*

The Vaccine Act's applicability to any particular claim derives, by statute, from an assessment of the date of the claimant's injury and an assessment of whether civil litigation had been instituted at the time the Vaccine Act became effective. The oldest category of claims, such as the one at issue here, involved claimants who had both been injured and had filed suit before the effective date of the Vaccine Act. Such claimants were, as the Court of Appeals below noted, "permitted but . . . not required to dismiss (the) civil action and bring a compensation claim under the [Vaccine] Act." (*Evans*, 167 F.3d at 1108; App. 3a, *citing Amendola v. Secretary, Dept. Health & Human Serv.*, 989 F.2d 1180, 1184 (Fed. Cir. 1993). In this regard, the Vaccine Act provides that a previously injured claimant with pending litigation "may, at any time within 2 years after the effective date . . . or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition [in the Court of Claims]." 42 U.S.C. § 300aa-u(a)(5)(A) (as amended in 1989).[1] The Vaccine Act further provides

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[1] Future claimants had somewhat different options available to them. Claimants who had sustained an injury but not filed suit before the effective date of the Vaccine Act were permitted either to file a civil action in court or a claim under the Vaccine Act. Once a claimant in this group filed a civil action, he or she was not then permitted to file a claim under the Vaccine Act. Claimants who had not yet sustained an injury at the time of the Vaccine Act's effective date were required to file a claim under the Vaccine Act before commencing a civil action. Thus, for the great majority of claimants for whom the compensation system created by the Vaccine Act has been available, "[r]ecourse to the Court of Claims is mandatory." *Evans*, 167 F.3d at 1108; App. 3a, *citing* 42 U.S.C. § 300aa-11(a)(2)(A).

that once the Court of Claims has entered judgment, "the petitioner must elect either to accept the award and formally abandon his or her tort rights or to reject the award and proceed by way of civil action." *Evans*, 167 F.3d at 1108 n.2; App. 4a, *citing* 42 U.S.C. §§ 300aa-11(a)(2) (A)(I) & 300aa-21(a). Because the petitioner had been injured before the effective date of the 1986 Act, she was required to dismiss her civil action if she chose to pursue compensation under the Act.

As the Court of Appeals noted, "filing a petition in the Court of Claims does not signal the abandonment of traditional tort rights." *Evans*, 167 F.3d at 1108; App. 4a. Thus, the Vaccine Act "recognizes the possibility of civil actions." *Evans*, 167 F.3d at 1109; App. 6a. With respect to civil actions, the Vaccine Act provides that "[s]tate law shall apply to a civil action brought for damages for a vaccine-related injury or death." 42 U.S.C. § 300aa-22(a). The Vaccine Act further provides that "[n]o state may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part." 42 U.S.C. § 300aa-22(e).

The legislative history of the Vaccine Act contains a House Report clarifying that the Vaccine Act was not intended to preempt state statutes of limitation. This Report provides that the Committee "does not intend . . . to preempt statutes of limitations or other provisions of state law and practices that regulate the time or manner in which civil actions may be brought or maintained . . . ." H.R. Rep. No. 99-908, at 27 (1986), U.S. Code Cong. & Admin. News 1986 at 6344, 6368. As the

Court of Appeals noted below, "[i]t is hard to imagine legislative history that speaks more directly to the issue . . . . " *Evans*, 167 F.3d at 1111; App. 11a. Petitioner never identified any legislative history to the contrary.

B. The Illinois Savings Statute

The Illinois savings statute whose application petitioner seeks to preempt is set forth at 735 ILCS 5/13-217. This savings statute allows, in certain enumerated circumstances,[2] a plaintiff to refile a civil action, and is therefore "a boon for plaintiffs." *Evans*, 167 F.3d at 1110; App. 8a.[3] The savings statute has repeatedly been interpreted by both Illinois and federal courts, however, as "providing for one and only one refiling regardless of whether the applicable statute of limitations has expired." *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 253, 582 N.E.2d 720, 720 (Ill. 1991). *See also Koffski v. Village of North Barrington*, 988 F.2d 41, 43-44 (7th

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[2] The savings statute applies "if judgment is entered for the plaintiff but is reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction." 735 ILCS 13/217.

[3] Because the savings statute provided such a boon to plaintiffs, the Illinois General Assembly sought to amend the statute in tort reform legislation. P.A. 89-7 § 15 (eff. Mar. 9, 1995). The Illinois Supreme Court, however, declared the tort reform legislation to be unconstitutional in its entirety. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (Ill. 1997).

Cir. 1993); *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858, 864 (Ill. 1989); *Gendek v. Jehangir*, 119 Ill. 2d 338, 518 N.E.2d 1051 (Ill. 1988). The savings statute is "part and parcel of Illinois' total statute of limitations scheme." *Cook v. Starling*, 104 F.R.D. 468, 470 (N.D. Ill. 1985); *see also Reyes v. Court of Claims of State of Illinois*, 299 Ill. App. 3d 1097, 702 N.E.2d 224 (Ill. App. 1998).

C. The Parties And The Course Of Proceedings In The Courts Below

The petition arises from an action for bodily injuries in which plaintiff sought to impose liability upon Lederle for its role as the manufacturer of a diptheria, pertussis and tetanus ("DPT") vaccine which allegedly caused injury to Jessica Evans. As the Court of Appeals below noted, the lawsuit at issue involved "[a] confusing chronology of litigation." *Evans*, 167 F.3d at 1106; App. 1a. Plaintiff in her Complaint alleged that Lederle sold a DPT vaccine to Link Clinic in Coles County, Illinois (Plaintiff's Complaint, ¶ 7), and that Dr. Sharma administered the vaccine to Jessica Evans at the Link Clinic in Coles County, Illinois on several occasions in 1978 (Plaintiff's Complaint, ¶ 8). Plaintiff further alleged that, as a result of the administration of those vaccines, she experienced a reaction to the pertussis component of the vaccine resulting in injury (Plaintiff's Complaint, ¶ 11).

Plaintiff originally filed her lawsuit for bodily injuries in the Circuit Court of Cook County, naming the Sarah Bush Lincoln Health Center, Dr. Ramesh Patel, the Link Clinic and Dr. O. Sharma as defendants. That complaint

was filed on August 14, 1985. The case was subsequently transferred to Coles County, Illinois. Petitioner voluntarily dismissed the state court complaint on July 14, 1988.

Petitioner commenced two other proceedings before the instant action was filed. In her complaint, petitioner describes those two other actions as follows:

> That on or about June 20, 1988 Plaintiff filed with the Court cause No. 88-3191 in which LEDERLE was a named defendant and that thereafter on August 24, 1990 Plaintiff filed a "Motion to Dismiss Without Prejudice So as to Allow Proceeding Under the National Vaccine Injury Compensation Act," which Motion was granted by the Court on August 28, 1990 whereupon on October 1, 1990 Plaintiff filed a Petition under the Act (No. 90-2265V) upon which there was no decision on the merits and which Petition was voluntarily dismissed by order of Special Master Millman of the U.S. Claims Court on January 31, 1995 whereupon on February 28, 1995 Plaintiff filed her election to proceed to suit.

(Plaintiff's Complaint, ¶ 3).

On February 28, 1995, plaintiff filed this action—the fourth action seeking damages for bodily injuries—in the United States District Court for the Central District of Illinois. In this action, plaintiff sued the Link Clinic, Dr. O. Sharma and Lederle. On May 10, 1995, Link Clinic and Dr. O. Sharma filed a motion to dismiss plaintiff's complaint, invoking the one-refiling rule contained in the savings statute. 735 ILCS 5/13-217. That motion was granted by the District Court by written order dated

October 31, 1995. *Evans v. Lederle*, 904 F. Supp. 857 (C.D. Ill. 1995). The grounds upon which the motion was made, and upon which it was ultimately granted, were that plaintiff violated section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217) when she refiled her action twice after it had been voluntarily dismissed.

Lederle thereafter filed a motion for judgment on the pleadings on the grounds that the "one refiling" rule of 735 ILCS 5/13-217 barred plaintiff's present lawsuit. Lederle's motion was granted by District Judge Mihm by written order dated January 28, 1998 (App. 18a-26a). Plaintiff timely filed a Notice of Appeal.

The Court of Appeals for the Seventh Circuit affirmed, in an opinion that was unanimous. Petitioner's petition for rehearing was denied. All of the judges on the original panel voted to deny rehearing. App. 31a. Petitioner made no suggestion for rehearing en banc to the Court of Appeals.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO ARTICULATE COMPELLING REASONS FOR GRANTING THE WRIT.

This Court should deny the Petition for Writ of Certiorari. Supreme Court Rule 10(a) provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10(a) also indicates the "character of reasons," which this Court considers in deciding whether to grant a petition for writ of certiorari. Petitioner fails to identify any of the reasons delineated in Supreme Court Rule 10(a) for granting a petition for writ of certiorari.

The petition does not demonstrate that the Court of Appeals has issued a decision in conflict with the decision of another United States Court of Appeals on the same important matter. The only decision cited by plaintiff in her petition that addresses the Vaccine Act, *Wells v. Secretary of the Department of Health and Human Services*, 28 Fed. Cl. 647 (1993), does not involve the issue of preemption. Indeed, the decision of the Court of Appeals is consistent with statements from decisions of other appellate courts, which petitioner does not cite. *See, e.g., Hurley v. Lederle Laboratories*, 863 F.2d 1173 (5th Cir. 1988) (referencing Vaccine Act in ruling that other federal statutes do not preempt state law in vaccine-injury lawsuits).

Nor does petitioner argue that the Court of Appeals has issued a decision that conflicts with a state court of last resort on the question presented. Indeed, on the state law issue that ultimately provided the rule of decision below, the decision of the Court of Appeals was consistent with every Illinois Supreme Court precedent on the subject. *Timberlake v. Illini Hosp.*, 175 Ill. 2d 159, 676 N.E.2d 634 (1997); *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 582 N.E.2d 720 (Ill. 1991); *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858 (Ill. 1989); *Gendek v. Jehangir*, 119 Ill. 2d 338, 518 N.E.2d 1051 (1988). *See also Koffski v. Village of North Barrington*, 988 F.2d 41 (7th Cir. 1993) (applying Illinois law). Petitioner has not challenged this consistent line of state court precedent.

Petitioner also has failed to demonstrate that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of

this Court's supervisory powers. Supreme Court Rule 10(a). Indeed, it is hard to imagine an issue less likely to recur. This appeal arises from a case with a "confusing chronology of litigation." *Evans*, 167 F.3d at 1106; App. 1a. Petitioner belongs to the oldest category of possible claimants under the Vaccine Act. Because claimants who filed actions after the effective date of the Vaccine Act were required to seek compensation under the Vaccine Act before resorting to a civil action—unlike petitioner here—the issue before this Court should not be encountered by those claimants.

Finally, the petition does not demonstrate that the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(a). Indeed, this Court has not addressed the preemptive scope of the Vaccine Act. Instead, the petitioner urges as a basis for certiorari review merely that the decision of the Court of Appeals contravenes the express provisions of the Vaccine Act (Petition, at 9), as well as the purposes for which the Vaccine Act was created (Petition, at 14). Petitioner, in essence, argues merely that the Court of Appeals erred. Supreme Court Rule 10 makes clear that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, should this Court credit petitioner's assignments of error, which it should not, they are patently insufficient to justify this Court's discretionary exercise of review on writ of certiorari.

II. THE DECISION BELOW CORRECTLY INTERPRETS THE PREEMPTIVE SCOPE OF THE VACCINE ACT.

Petitioner's argument fails to identify whether her preemption argument is predicated upon principles of express or implied preemption. By referencing the "plain language" of the Vaccine Act, petitioner presumably invokes the doctrine of express preemption. Although reiterating established principles of statutory construction, which are not disputed, petitioner misapplies those principles to the Vaccine Act.

Significantly, petitioner's argument ignores that portion of the Vaccine Act providing as follows: "State law shall apply to a civil action brought for damages for a vaccine related injury or death." 42 U.S.C. 300aa-22(a). This provision, or "statutory caveat," as it was called by the Court of Appeals, *Evans*, 167 F.3d at 1112; App. 14a, was clearly designed to express Congress's intention that "the commencement or resumption of civil proceedings—as well as their substantive determination—is a matter for state law." *Evans*, 167 F.3d at 1112; App. 14a, *citing* 42 U.S.C. §§ 300aa-21(c) & 300aa-22(a). As the Court of Appeals below correctly determined, "there is no reason to believe that in deciding not to preempt state statutes of limitation Congress intended to make an exception for plaintiffs who had civil actions pending when the Act came into effect." *Evans*, 167 F.3d at 1112; App. 14a. Petitioner's argument renders the above-cited provision meaningless, and therefore violates the very principles of statutory construction espoused in the cases she cites. (Petition, at 9-10, *citing United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Wells v. Secretary of Department of Health and Human Services*, 28 Fed. Cl.

647, 660 (1993), *quoting Boise Cascade Corp. v. EPA*, 942 F.2d 1427 (9th Cir. 1991)).

Moreover, the decision of the Court of Appeals is consistent with the unequivocal legislative history of the Vaccine Act. Title 42 U.S.C. § 300aa-22(e) provides as follows:

> No state may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this Court.

42 U.S.C. § 300aa-22(e). A House Report that is a part of the Vaccine Act's legislative history explains this provision as follows:

> State statutes that effectively foreclose individuals from bringing civil actions for vaccine-related injuries or death or [sic] preempted by this subsection. The committee intends this preemption to apply even where a state has established a compensation system as an alternative to filing a civil action. It does not intend, however, to grant statutes of limitations or the provisions of state law in practice that regulate the time or manner in which civil actions in general may be brought or maintained . . .

H.R. Rep. No. 99-908, at 27 (1986), U.S. Code Cong. & Admin. News 1986 at 6344, 6368. There are no contrary statements in the legislative history, and, as the Court of Appeals noted, "Evans did not address this legislative history." *Evans*, 167 F.3d at 1111 n.6; App. 11(a). Indeed, in this Court, petitioner offers no contrary construction of the legislative history. As the Court of Appeals cor-

rectly noted, "[i]t is hard to imagine legislative history that speaks more directly to the issue . . . ." *Evans*, 167 F.3d at 1111; App. 11a.

Ultimately, petitioner's argument fails, because it undermines one of the important purposes of the Vaccine Act. As the Court of Appeals noted correctly below, one of the principal purposes of the Vaccine Act is "to free manufacturers from the specter of large, uncertain, tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." *Evans*, 167 F.3d at 1111; App. 10a *citing Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994) (*citing* legislative history). Thus, petitioner's argument, which ignores this important purpose of the statute, violates the very principles of statutory construction referenced in the cases she cited.

III. THE DECISION BELOW CORRECTLY REJECTED PETITIONER'S IMPLIED CONFLICT PREEMPTION ARGUMENT.

Petitioner argues that the writ of *certiorari* should be granted because the decision below stands as an obstacle "to the accomplishment and execution of the full purposes and objectives of Congress." (Petitioner's Brief, at 14, *citing Felder v. Casey*, 487 U.S. 131, 138 (1988)). Petitioner, in effect, argues that the Vaccine Act preempts the Illinois savings statute under the doctrine of implied conflict preemption. Petitioner's argument fails for much the same reason that her express preemption argument fails. Petitioner ignores an important purpose of the Vaccine Act.

The Court of Appeals correctly analyzed the implied conflict preemption issue in its decision below. In this regard, the Court of Appeals ruled as follows:

> Indeed, common sense suggests that if state statutes of limitation were preempted—and not replaced by federally prescribed limitations—vaccine-injured plaintiffs would have extraordinary freedom to commence lawsuits at a time and in a manner of their own choosing. This result would be contrary to an important federal purpose underlying the Act, namely, "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." Schafer, 20 F.3d at 4 (citing legislative history); see also Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 565, 110 S. Ct. 2121, 109 L. Ed. 2d 588 (1990) ("strict language . . . does not control, even if the statutory language has a plain meaning, if the application of that language will produce a result demonstrably at odds with the intention of its drafters") (internal quotations and citation omitted).

Evans, 167 F.3d at 1111; App. 10a. Nothing in the Vaccine Act suggests that Congress intended that there would be open-ended liability for vaccine manufacturers, and such a result would undermine the Vaccine Act's purpose of making vaccines available by freeing manufacturers from the specter of uncertain liability.

Petitioner's reference to *Felder v. Casey*, 487 U.S. 131 (1988), undermines her argument. In *Felder*, this Court echoed the very sentiments expressed by the Court of Appeals in this case concerning the threat of open-ended liability created thereby. This court discussed the differ-

ence between the notice of claim provisions at issue in *Felder* and state statutes of limitation, stating as follows:

> . . . Courts have reasoned that, unlike the lack of statutes of limitation . . ., the absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes . . . Because statutes of limitations are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity.

487 U.S. at 140. This Court recognized in *Felder* both that statutes of limitations are "universally familiar aspects" of litigation and that Congress could sensibly decide not to create rights "enforceable in perpetuity." Petitioner's effort to create a perpetual right to sue vaccine manufacturers under the circumstances of this case should be rejected. Thus, the very case on which petitioner predicates her implied preemption argument fails to provide support.

CONCLUSION

Petitioner has failed to articulate any of the character of reasons justifying the granting of a petition for writ of certiorari. The decision of the Court of Appeals below does not conflict on the question presented with the decisions of any other Court of Appeals. To the extent the decision below is predicated on state law, it is consistent with a long line of Illinois Supreme Court precedent. The issue raised here is unlikely to recur given the convoluted procedural posture of the case. Most important, the de-

cision of the Court of Appeals properly effectuated the intent of Congress in enacting the Vaccine Act.

WHEREFORE, for the foregoing reasons, the respondent, Lederle Laboratories, respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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